**Laborers' International Union of North America Local 110 *and* U.S. Silica Company and International Union of Operating Engineers, AFL–CIO, Local 513.** Case 14–CD–153807

November 24, 2015

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND MCFERRAN

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act (the Act). U.S. Silica Company (the Employer) filed a charge on June 9, 2015,[1] alleging that Laborers' International Union of North America Local 110 (Laborers) violated Section 8(b)(4)(D) of the Act by threatening to engage in proscribed activity with an object of forcing the Employer to assign certain work to employees represented by Laborers rather than to employees represented by International Union of Operating Engineers, AFL–CIO, Local 513 (Operating Engineers). A hearing was held on June 30 before hearing officer Krista L. Lopez. Thereafter, the Employer and Laborers filed posthearing briefs. Operating Engineers also filed a motion to quash the Section 10(k) notice of hearing and a posthearing brief in support of its motion.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

## I. JURISDICTION

The Employer, a Delaware corporation, operates a silica mine and processing plant in Pacific, Missouri, where it produces industrial mineral materials. The parties stipulated that during the 12-month period prior to the hearing, the Employer purchased and received goods valued in excess of $50,000 directly from points outside the State of Missouri. The parties further stipulated that the Employer is an employer within the meaning of Section 2(2) of the Act, and we find that it is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The parties additionally stipulated, and we find, that Laborers and Operating Engineers are labor organizations within the meaning of Section 2(5) of the Act.

[1] All dates are 2015 unless otherwise specified.

## II. THE DISPUTE

### *A. Background and Facts of the Dispute*

At the Pacific, Missouri silica mine and plant, the Employer employs 4 employees represented by Operating Engineers and approximately 36 employees represented by Laborers. The Employer has recognized those labor organizations as the exclusive representatives of the employees for several decades.

The Pacific operation spans 530 acres. Employees represented by Operating Engineers work at the northern end of the property, near the mine. Using heavy equipment, the Operating Engineers-represented employees shovel blasted sandstone into a pipeline that transmits the raw product to the processing plant at the southern end of the property, 1.5 to 2 miles away. At the processing plant, the sandstone is processed to customers' specifications and loaded onto trucks and rail cars for shipment.

At the processing plant, Union Pacific Railroad delivers empty rail cars and retrieves filled cars for transport of the processed sandstone. This occurs approximately 6 days a week, and employees represented by Laborers spend a significant amount of their work time loading and unloading rail cars. In addition, Laborers-represented employees perform maintenance tasks in the processing plant and, 1–3 times a week, load materials onto trucks to be loaded onto barges.

Sand loaders, who are represented by Laborers, are tasked primarily with loading the processed sandstone onto rail cars and trucks. This work historically consisted of positioning the rail cars and trucks, loading the sandstone, and—in the case of rail cars—transporting the rail cars across the highway for storage. Prior to March, sand loaders moved and filled rail cars via a "gravity drop" method. Sand loaders coupled the rail cars and then, using the cars' hand brakes, maneuvered the cars down a small gradient and positioned them under loading silos. The sand loaders then released and reapplied the hand brakes to properly position the cars, loaded and weighed the cars, and then released the hand brakes to allow the cars to move downward to be lined up for transport by Union Pacific. Following transport, the railroad would return empty rail cars and place them at the top of the gradient for refilling.

The Employer determined that the gravity drop procedure was undesirable and unsafe. Consequently, in March, the Employer purchased a piece of equipment called a Track Mobile for use in positioning and moving the rail cars. The Track Mobile operates like a small railway locomotive that can move both on roads and on railway ties and is used to push or pull rail cars into position. Thus, instead of relying solely on a hand brake to stop and start the rail cars, the Track Mobile drives up to

the storage area, couples with the rail cars, and then moves them down the hill to the filling silos. Once filled, the Track Mobile moves the rail cars to the holding area.

When Operating Engineers learned that the Employer was purchasing the Track Mobile, it met with the Employer to discuss its operation. After the Employer informed Operating Engineers that sand loaders would be trained to operate the new equipment, Operating Engineers filed a grievance on March 30, stating that the Employer violated its collective-bargaining agreement by assigning the Track Mobile work to employees outside the unit. The grievance further stated, "[Operating Engineers] demands that this work be performed by the bargaining unit members pursuant to the collective bargaining agreement."

In April, the Employer began training about 15 sand loaders in the Laborers' bargaining unit to operate the Track Mobile. This included training from the railroad, the manufacturer, and the Employer's on-site safety coordinator to ensure that employees knew how to safely operate the equipment. Since acquiring the Track Mobile, the Employer has assigned its operation exclusively to the sand loaders.

On May 18, Laborers wrote to the Employer stating it had learned that Operating Engineers claimed the work of operating the Track Mobile, including by filing a grievance and seeking arbitration. The letter stated, "If the work of operating the track mover is reassigned from the Local 110 unit to the Local 513 unit, Local 110 will picket the Employer for the purpose of keeping this work in our Local 110 bargaining unit."

On June 2, Operating Engineers sent a letter to the Employer with the subject heading, "Operating Engineers Local 513—Grievance Regarding Proper Wages and Benefits Due to Individuals Operating the Track Mobile," seeking to clarify the arbitration schedule. On July 6, after the hearing in this case had concluded, Operating Engineers withdrew its grievance and filed a document with the Board disclaiming the work in dispute.

### *B. Work in Dispute*

The notice of hearing describes the disputed work as "the operation of the Track Mobile at the U.S. Silica Company facility in Pacific, Missouri."

### *C. Contentions of the Parties*

Operating Engineers has moved to quash the notice of hearing, arguing that there is no dispute under Section 8(b)(4)(D) or Section 10(k) of the Act because it is not attempting to have the work reassigned to employees that it represents. Rather, Operating Engineers argues that it seeks to have the terms of its collective-bargaining agreement apply to the employees currently operating the Track Mobile. Operating Engineers argues that the subject line of its June 2 letter ("Grievance Regarding Proper Wages and Benefits Due to Individual Operating the Track Mobile") makes clear that it was only seeking contractual benefits for the individuals operating the Track Mobile and not reassignment of the work. Operating Engineers also cites its July 6 Disclaimer of Interest, wherein it asserts it has withdrawn its grievance concerning the work as evidence that it does not claim the Track Mobile work.

The Employer and Laborers argue that Operating Engineers clearly claimed the Track Mobile work and that it is properly assigned to employees represented by Laborers. The Employer contends that there is reasonable cause to believe that Laborers violated Section 8(b)(4)(D) of the Act by its threat to picket if the Track Mobile work were reassigned. On the merits, the Employer and Laborers argue that the factors of collective-bargaining agreements, company preference, past practice, and economy and efficiency of operations favor an award of work to employees represented by Laborers. Laborers additionally argues that the factor of area and industry practice supports an award of the work to employees it represents.

### *D. Applicability of the Statute*

The Board may proceed with a determination under Section 10(k) of the Act only if there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. *Operating Engineers Local 150 (R&D Thiel)*, 345 NLRB 1137, 1139 (2005). This standard requires finding that there is reasonable cause to believe that there are competing claims for the disputed work between rival groups of employees and that a party has used proscribed means to enforce its claim to that work. Additionally, the Board must also find that the parties have not agreed on a method of voluntary adjustment of the dispute. Id. On this record, we find that this standard has been met.

#### 1. Competing claims for work

We find that there are competing claims for the work in dispute. Both Laborers and the Employer stipulate that Laborers claimed the work in dispute in this case. Moreover, employees represented by Laborers have been performing Track Mobile operation since April. See *Chicago and Northeast Illinois District Council of Carpenters (Prime Scaffold)*, 338 NLRB 1104, 1106 (2003) (finding that a group of employees' performance of disputed work is sufficient to evidence a claim for that work); *Laborers' Union Local 310 (Safway Services)*, 363 NLRB No. 25, slip op. at 2 (2015).

Operating Engineers argues that, after the close of the hearing, it disclaimed the work at issue, served notice of its intent to withdraw its grievance, and avowed it will not file a new grievance. The Board generally will grant a motion to quash where a party has presented a "clear, unequivocal, and unqualified disclaimer of all interest in the work in dispute." *Operating Engineers Local 513 (Thomas Industrial Coatings)*, 345 NLRB 990, 992 (2005) and cases cited therein. However, the Board will refuse to give effect to "'hollow disclaimers' interposed for the purpose of avoiding an authoritative decision on the merits." *Laborers Local 81 (Kenny Construction Co.)*, 338 NLRB 977, 978 (2003).

As an initial matter, Operating Engineers clearly sought assignment of the disputed work in its March 30 grievance, stating that "[Operating Engineers] demands that this work be performed by the bargaining unit members pursuant to the collective bargaining agreement." Contrary to Operating Engineers' contention, its June 2 letter entitled "Operating Engineers Local 513—Grievance Regarding Proper Wages and Benefits Due to Individuals Operating the Track Mobile" did not clearly disclaim the work, but rather sought to expedite its grievance to arbitration.

Further, contrary to Operating Engineers' claim, we find that its grievance was jurisdictional and not representational in nature. That grievance would require any employee operating the Track Mobile to be covered by Operating Engineers' collective-bargaining agreement with the Employer and subject to that agreement's union-security clause requiring Operating Engineers' membership as a condition of employment. Thus, sand loaders operating the Track Mobile who are currently represented by Laborers would be required to become Operating Engineers members or face discharge. Under these circumstances, we find that Operating Engineers' grievance sought to effectively remove work from employees represented by Laborers and give it to employees represented by Operating Engineers. In similar cases, the Board has rejected the argument that such claims are representational and found that they amounted to attempts to acquire disputed work. See *Laborers Local 79, (DNA Contracting)*, 338 NLRB 997, 999 (2003) (dispute jurisdictional where union sought to perform work under union-security contract and another union was already performing the work under contract).

Furthermore, it was only on July 6, after the hearing in this matter closed, that Operating Engineers withdrew its grievance and disclaimed the work at issue. The Board has found that such disclaimers proffered at the conclusion of a 10(k) hearing are ineffective. *International Operating Engineers Local 150 (Royal Components)*, 348 NLRB 1369, 1370 (2006); *Electrical Workers IBEW Local 98 (Lucent Technologies)*, 324 NLRB 230, 231 (1997).

Finally, notwithstanding its purported disclaimer of the work, Operating Engineers argues in its post-hearing brief (filed after it submitted its disclaimer) that employees operating the Track Mobile are members of Operating Engineers while they perform that work. Given these contradictory claims, we cannot find that Operating Engineers clearly and unequivocally disclaimed the disputed work. See generally *Plumbers Local 562 (Grossman Contracting*), 329 NLRB 516, 520 (1999) (finding no effective disclaimer where the union argued that it no longer wished to have its employees perform disputed work and withdrew its grievances but provided vague answers at the hearing about the disclaimer and did not mention the disclaimer in its posthearing brief). Accordingly, we find that there are competing claims for the work in dispute.

2. Use of proscribed means

We also find reasonable cause to believe that Laborers used means proscribed under Section 8(b)(4)(D) to enforce its claim to the disputed work when, in its May 18 letter to the Employer, Laborers' Business Manager Wiley informed the Employer that it was claiming the Track Mobile work for the Laborers bargaining unit employees and threatened to picket the Employer if the work were reassigned to the Operating Engineers' bargaining unit. The Board has long considered this type of threat to be a proscribed means of enforcing claims to disputed work. *Operating Engineers Local 150 (Patten Industries)*, 348 NLRB 672, 674 (2006).

3. No voluntary method for adjustment of the dispute

We also find no agreed-upon method for voluntary adjustment of the dispute to which all parties are bound. The Employers and Laborers agree that there is no voluntary adjustment procedure in place between the parties to resolve the current work dispute. Operating Engineers would not so stipulate but proffered no evidence or argument to the contrary.

Based on the foregoing, we find that there are competing claims for the work in dispute, reasonable cause to believe that Section 8(b)(4)(D) has been violated, and no agreed-upon method for the voluntary adjustment of the dispute. We accordingly find that the dispute is properly before the Board for determination, and we deny Operating Engineers' motion to quash the notice of hearing.

*E. Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers Local 1212 (Co-*

*lumbia Broadcasting)*, 364 U.S. 573, 577–579 (1961). The Board has held that its determination in a jurisdictional dispute is "an act of judgment based on common sense and experience," reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J.A. Jones Construction)*, 135 NLRB 1402, 1410–1411 (1962).

The following factors are relevant in making the determination of dispute.

1. Certifications and collective-bargaining agreements

Laborers asserts that Local 110 has been certified to represent employees in its bargaining unit. The collective-bargaining agreement between the Employer and Laborers includes production and maintenance employees, including the sand loader position. That agreement excludes operators of shovels, front end loaders, cranes, and dozers.

The collective-bargaining agreement between Operating Engineers and the Employer includes employees who operate all mobile equipment except for drills and production forklifts and excludes all general laborers, crushers, dryer and mill operators, sand loaders, mine helpers, drillers, sharpener operators, truck operators, supervisory employees, office workers and watch men.

Although neither collective-bargaining agreement specifically includes operation of a Track Mobile, the "all mobile equipment" language in the Operating Engineers' agreement arguably would support its claim. By the same token, the Track Mobile is a device used in performing traditional Laborers' sand loader work, and is not among the enumerated equipment excluded by the Laborers' agreement.

Considering the evidence, we find that this factor does not favor an award of the work in dispute to either unit of employees.

2. Employer preference and past practice

Plant Manager Scott Conroy testified that the Employer has been assigning the operation of the Track Mobile to employees represented by Laborers and prefers to continue that assignment. Conroy testified that sand loaders' primary responsibility has been to move rail cars from the storage area to the loading area to be filled, and then downward to be retrieved by the railroad for transport. Those basic job functions remain the same, with sand loaders using the Track Mobile to maneuver the rail cars instead of manipulating the movement of the cars by using the hand brake method. Conroy testified that hand brakes and skid plates are still utilized for safety precautions, even with the advent of the Track Mobile, and sand loaders are well versed in the safety issues and the dangers of moving rail cars around the facility.

Conroy acknowledged that occasionally an employee represented by Operating Engineers would be called in to reposition cars using a loader to push the rail cars back up the hill when they were not properly aligned with the loading chutes. However, this occurs only rarely.

We find that employer preference and practice favors an award of the work to employees represented by Laborers.

3. Area and industry practice

There was little evidence presented at the hearing of area and industry practice.[2] Although the Employer uses Track Mobiles at six of its other facilities, it does not use employees represented by either Laborers or Operating Engineers to operate that equipment. Accordingly, we find that this factor does not favor an award of the work in dispute to either employee group.

4. Relative skills and training

When the Employer determined that it would replace its gravity drop method of moving rail cars with a Track Mobile, it chose employees represented by Laborers because sand loaders had generally been tasked with the loading and movement of rail cars at the production facility. The Employer then assigned 15 members of the Laborers to train in the operation of the Track Mobile. This training included instruction by the manufacturer, the railroad, and representatives of the Employer on the operation of the machine and safety. In addition, while the method of moving the rail cars from gravity drop to Track Mobile changed, the process of filling the rail cars remained the same. Thus, sand loaders relied on their already-existing skills and training to operate the hand brake (albeit less frequently), position skids under rail cars for loading, inspect empty rail cars, couple and uncouple cars, use computerized scales, and negotiate traffic on the highways while the rail cars were moving from one area of the facility to another.

While employees represented by Operating Engineers have experience and training in operating pieces of large mobile equipment, employees represented by Laborers also have some experience in this type of work. Conroy testified that employees represented by Laborers utilize large vehicles to haul materials around the facility as well as forklifts, pickup trucks, boom trucks, loaders, and water trucks. Thus, while employees represented by Operating Engineers may have greater experience in the oper-

[2] Laborers presented testimony about a Dinky Locomotive that was previously used in the area for moving material cars like flatbeds and trailers. Laborers testified that employees it represents operated the Dinky Locomotive to perform functions akin to the Track Mobile. The limited and generalized testimony presented was insufficient to support a finding of a past practice favoring Laborers-represented employees.

ation of certain types of heavy equipment, generally both groups of employees are capable of handling large motorized vehicles.

We therefore find that the factor of relative skills and training favors an award of the disputed work to employees represented by Laborers.

5. Economy and efficiency of operations

The Employer presented testimony about the operations of the mine and production facility. While employees represented by Laborers work primarily in the production facility, employees represented by Operating Engineers work 1.5 to 2 miles away at the mine itself, with one of the four unit employees working per shift. Travel between the mine and the production facility takes 10–15 minutes by truck. If an existing employee represented by Operating Engineers was assigned to the Track Mobile, that employee would have to travel back and forth between the mine and the production facility, resulting in delays (both in the rail car work and at the employee's home base). Conroy further testified that it would not be economical to hire a new employee represented by Operating Engineers to operate the Track Mobile exclusively because the actual operation of the machine constitutes a small fraction of employees' daily duties. Once the rail cars have been moved into place, there is no further need to use the Track Mobile, but other jobs, such as overseeing loading of the cars and performing tasks in the production facility, can be performed by an employee represented by Laborers. Furthermore, 3–4 times a week, sand loaders set aside their duties loading rail cars to load trucks to ship materials on barges. During this time, there would be no work for an employee represented by Operating Engineers to perform. Similarly, throughout the day, sand loaders load other customer trucks. As such, an employee hired to exclusively operate the Track Mobile would experience large spans of downtime.

We therefore find that these factors favor an award of the disputed work to employees represented by Laborers. See *Laborers (Eshbach Bros. LP)*, 344 NLRB 201, 204 (2005) (finding that the factor of economy and efficiency of operations favors an award of work to Laborers where it was shown that they performed other work in addition to the disputed work).

CONCLUSION

After considering all of the relevant factors, we conclude that employees represented by Laborers are entitled to perform the work in dispute. We reach this conclusion based on the factors of employer preference and practice, relative skills and training, and economy and efficiency of operations. In making this determination, we award the work to employees represented by Laborers, not to that labor organization or its members.

Dated, Washington, D.C., November 24 , 2015

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Mark Gaston Pearce, Chairman

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Kent Y. Hirozawa, Member

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Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD